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SUMMARY RECORD OF THE 475th MEETING

Held at Headquarters, New York,
on Friday, 8 May 1992, at 10 a.m.

Chairman: Mr. ABASCAL ZAMORA (Mexico)

CONTENTS

International payments: draft Model Law on International Credit Transfers (continued)

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The meeting was called to order at 10.15 a.m.

INTERNATIONAL PAYMENTS: DRAFT MODEL LAW ON INTERNATIONAL CREDIT TRANSFERS (continued) (A/46/17; A/CN.9/346, 347 and Add.1 and 367)

1. Mr. CRAWFORD (Canada) said that his delegation was in favour of retaining article 18 of the draft Model Law on International Credit Transfers (A/46/17, annex I), because it was useful to have a rule on conflict of laws. The first sentence of article 18 (1) confirmed the Parties' autonomy with respect to issues affecting payment, while the second sentence provided a good default rule in the absence of the exercise of such autonomy. The Commission should not decided to delete article 18 merely because the conflict-of-laws rule might not be the best possible rule for credit transfers.

2. Mr. BURMAN (United States of America) said that his delegation supported the statement of the representative of Canada. Article 18 provided the kind of guidance that made commercial transactions work better than did the absence of a rule on conflict of laws. The article would provide a workable solution for countries that adopted the Model Law, and would provide all parties that did not otherwise choose their applicable law under the first sentence of article 18 (1) with a rule to fall back on.

3. Mr. GREGORY (United Kingdom) said that his delegation did not share the views expressed in the note prepared by the Hague Conference on Private International Law, which drew attention to a number of difficulties concerning article 18. The Hague Conference maintained that it was not possible to include a conflict-of-laws rule in a substantive law, particularly a rule that determined whether or not the Model Law itself applied. However, that was not what article 18 purported to do. A country that had adopted the Model Law with article 18 in it would apply the conflict-of-laws rule when a situation described in that rule arose. The Hague Conference maintained that it made no sense to consider only the separate segments of a credit transfer, and that it was necessary to consider the credit transfer as a whole. Nevertheless, that was not a reason for dismissing the rule entirely. A credit transfer was a series of separate operations involving individual parties - senders and recipients of payment orders - between whom a dispute might arise. In analysing a credit transfer, it was possible to consider the obligations of a party in respect of a payment order or a particular segment of the credit transfer, and to determine which law applied.

4. If all countries adopted the Model Law, there would be no need for a conflict-of-laws rule. The rule was necessary because some countries might not adopt the Model Law, while others might adopt it with variations. Moreover, a credit transfer might pass through a number of countries whose laws were different. It was necessary to include in the Model Law some statement to the effect that rules should apply only where all parties were subject to them, either under their relevant law or by agreement. However,

(Mr. Gregory, United Kingdom)

the Law would not work unless all participants in credit transfers were subject to it. Perhaps the Secretary of the Commission could provide some guidance in that respect.

5. Mr. HERRMANN (Secretary of the Commission) said that article 18 was a conflict-of-laws rule and was not designed to determine the territorial sphere of application of the Model Law in any other way. The rule applied only to a dispute in a State that had adopted article 18, and had no bearing on whether the States to which the rule referred had adopted the Model Law or not. If the rule referred to a State that had adopted the Model Law, it would then be necessary to determine whether the transaction involved an international credit transfer, in which case the Model Law would apply; otherwise, the existing national law, if any, would apply. In accordance with article 1 (1), the question of sphere of application would arise only when reference was made to the State whose law would apply.

6. The conflict-of-laws rule provided a single law that was applicable to the entire international credit transfer. If it was realistic to expect States and their banks to agree to a single, uniform law, and to expect that the law of the State of the receiving bank would apply, that would mean that the Model Law would apply only in States that adopted it. A dispute taken to a court in one of the States parties could be settled easily. However, a problem might arise with a bank other than the beneficiary's bank. If a State had adopted the Model Law and that Law was applicable, there would be no need for a uniform system.

7. Consideration should be given to whether or not a State would be willing to accept the substantive unitary system provided by the Model Law and, in addition, a convention on the applicable law, which was currently being prepared by the Hague Conference. It might be preferable to have separate instruments in cases where a State had objections to adopting the unitary system but, in the area of conflicts, wished to become a party to a convention on the applicable law.

8. Mr. CHATURVEDI (India) said that his delegation supported the views expressed by the representatives of the United States and Canada regarding the desirability of retaining article 18.

9. Mrs. FERNANDEZ DE GURMENDI (Argentina) said that her delegation had considered the arguments adduced by the Hague Conference in its note, and wished to join those delegations that were in favour of deleting article 18. While a rule on conflict of laws was necessary, the Commission should endeavour to adopt a rule that would satisfy all parties concerned. It might therefore be better to wait three or four years until the Hague Conference had completed its convention on the applicable law.

10. Mr. SANDOVAL (Chile) said that his delegation was in favour of deleting article 18 in its entirety.

11. Mr. LOJENDIO (Spain) said that his delegation was in favour of retaining article 18. A decision to wait until another organization prepared a conflict-of-law rule would considerably delay the adoption of the Model Law. Moreover, while the Hague Conference made significant contributions to private international law, it lacked the universality of the United Nations.

12. The arguments for deleting article 18 were based on objections to the subsidiary rule, not to the main rule that provided that the parties were free to choose the law governing the rights and obligations arising out of a payment order. The subsidiary rule, which involved the application of the law of the State of the receiving bank, would apply only in the absence of agreement.

13. His delegation wished to know the precise reasons why some delegations considered the rule in article 18 to be invalid with respect to electronic transfers.

14. Some delegations favoured a single law that would apply to the entire credit transfer. However, it was quite possible that the parties involved in each segment of the transfer might choose a law that was different from the law chosen by the parties in the previous or subsequent segment. Those who defended the theory of the single law could not contend that the free choice of different laws would be restricted by the principle of the single law. If a problem were to arise in a single segment of the transfer, he did not understand why it would have to be resolved according to a law that was not directly applicable to the segment. More important than the single law itself was the proximity between a segment and the law that governed it; in that respect, article 18 satisfied that requirement.

15. Mr. KOMAROV (Russian Federation) said that his delegation supported the retention of article 18. In addition to the arguments already put forward in favour of retention, he would point out that the provisions of article 18 should be regarded not as an attempt to resolve questions of conflict of laws in credit transfers in general, but as a supplemental rule which could help to unify the substantive rules of the Model Law itself. From that point of view, the provision was the logical culmination of the effort of unification embodied in the draft Model Law. Moreover, even if the Model Law were to be adopted by all States, the provision would not automatically obviate all conflicts of laws, because the Model Law did not attempt to regulate all situations; that was true even in the case of parties in countries which had codified their rules concerning credit transfers. The provision should therefore be regarded as a general indication to countries of the need to take a more flexible approach to the question of conflicts of laws.

16. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that, in connection with the remarks made by the Secretary of the Commission, he wished to make it clear that there was no competition between his organization and the Commission, but only cooperation.

17. In clarification of his own view, he added that what he had said at an earlier meeting was that a Model Law without rules of autonomous application in particular cases could be implemented only through the use of a conflict-of-laws system. With respect to how the Model Law could be made applicable to the entire transaction, he would reply that that could only be done either by the adoption of a convention containing rules governing the entire transaction, or by the inclusion in the Model Law of a rule governing conflict of laws. Of course, a convention would require enforcement in the sense of ratification and incorporation into national legal systems, but if the Hague Conference drew up such a convention and States approved of it, they would then of course proceed to ratify and adopt it.

18. With respect to the comment that article 18 established a degree of certainty on the question, he would reply that, on the contrary, article 18 provided no certainty. For example, in the hypothetical case of a credit transfer from Salzburg to Cleveland, Ohio, via Vienna and New York on which litigation subsequently arose in London, a judge would find no certainty in the provision, because he would be unable to establish in which intermediate segment of the transaction any particular event had taken place.

19. With respect to the comment that the rule of autonomy was a good one and should be retained, he would add that it also created great problems. For example, if, in the hypothetical case he had referred to, the New York segment of the transaction involved on electronic transfer under the CHIPS system, all segments of the transaction would automatically be subject to New York law under the legislation of that State. His point was that if the rule on conflict of laws was retained as it stood in article 18, it would create many more problems than it would resolve.

20. The CHAIRMAN asked the observer for the Hague Conference how the hypothetical problem he had given as an example would be resolved under the Rome Convention.

21. Mr. PELICHET (Observer, The Hague Conference on Private International Law) said that the Rome Convention would not, in his opinion, offer a good solution to the problem, as it consisted of a set of general contractual rules. In dealing with international credit-transfer questions, a more detailed set of rules than those provided by that Convention would be required.

22. Mr. BISCHOFF (Observer for Switzerland) said that he favoured the deletion of article 18 in its entirety, for the reasons given by the observer for the Hague Conference.

23. Mr. BHALA (United States of America) said that the work of both the Hague Conference and the Commission was valuable. There seemed no need to try to decide which was the more appropriate body to deal with questions of conflict of laws.

24. It seemed to him that the observer for the Hague Conference had demonstrated the potential usefulness of article 18, as he had given an example of a hypothetical conflict of laws arising out of a credit transfer and then proceeded to solve the problems involved through the application of the Model Law. His delegation did not maintain that segmentation in itself was a good thing; its preference would be, rather, for an end-to-end system. But the only way to achieve such a system was either by universal adoption of the Model Law, which was unlikely, or for the parties to a credit transfer to agree that the Model Law applied, which was possible as a practical matter. A similar approach had been adopted in United States federal jurisprudence to deal with a similar situation, and had provided some certainty. The point was that a beginning had to be made somewhere.

25. Mr. ROJANAPHAUK (Thailand) said that if a convention on conflict of laws was adopted, its provisions would govern such questions - but no such convention was as yet in existence. In any case, the Model Law could include provisions with respect to conflict of laws which might be useful. It was indeed necessary to have some applicable rule providing certainty on the question. Moreover, the first sentence of article 18 (1), which left choice of the applicable law to the parties, should alleviate the concerns of those not in favour of the second sentence.

The meeting was suspended at 11.30 a.m. and resumed at noon.

26. Mr. LIM (Singapore) said that he felt sympathetic towards those who considered that article 18 provided a degree of certainty, but he was afraid that it was more ambiguous than the existing rules on conflict of laws, which the Commission should not attempt to modify without sufficient consideration.

27. For article 18 to apply, all relevant States would have to have adopted the Model Law. If that were not the case, article 18 would apply only if the Model Law were the applicable law, which would have to be determined by the rules on conflict of laws. The problem was circular, and article 18 seemed of limited usefulness.

28. Mr. MONTES DE OCA (Mexico) said that having heard the arguments for and against article 18, he was in favour of its retention.

29. Mr. EL-SHARKAWY (Egypt) said that for the reasons which he and others had already stated, he was convinced that article 18 should be deleted. He did not propose to repeat all the reasons he had already given, but wished to add one further consideration. The Model Law would be applied by national courts. If a national court found the Model Law not to be applicable, then its provision on conflict of laws, article 18, would not be applicable either. If the Model Law's applicability or inapplicability was to be decided by the national courts, then there was no need for a rule on conflicts of laws.

30. Mrs. AUGIER (France) recalled that France had been in favour of deleting article 18. Having heard the arguments of the various representatives, in particular those who were in favour of retaining it, her delegation had concluded that the discussion had a dual nature. On the one hand, there was a question of private international law, and of the rule on conflict of laws. On the other hand, there was the issue of the underlying conception of the Model Law, which came down to the question of whether credit transfers were seen as a single operation running from the originator to the beneficiary, or as a series of separate segments. If consideration of article 18 did indeed make it necessary to re-examine the underlying conception of the Model Law, she proposed that article 18 should be removed from the Model Law and referred to a group of experts.

31. Mr. MOORE (Nigeria) said that particularly after listening to the views of the observer for the Hague Conference, he saw no reason to retain article 18.

32. Mr. DASTIS (Spain) said that he was in favour of retaining article 18. It might well be that the Hague Conference would deal with the issue in more detail at some time in the future, but it had to be asked when that future might be. Some of the Hague Conference's Conventions, although completed, were not yet in force.

33. Article 18 seemed fundamentally acceptable, and he urged that the Commission should retain it rather than put off to some uncertain future the resolution of the question of conflict of laws.

34. Mr. DE BOER (Observer for the Netherlands) said that he had found most convincing the argument of the observer for Finland that because of article 18, which was relatively minor, some countries might not accept the rest of the Model Law.

35. Mr. DRAGOS (Observer for Romania) stated that it was very important for a country such as Romania, which was currently undergoing the transition to a free-market economy, to be able to rely on a precise framework regulating international relationships. He supported retention of article 18, with one minor modification, namely that article 18 (1) should state that the article would apply as a subsidiary or complement to the national law of the receiving bank.

36. Mr. SONO (Observer, International Monetary Fund) said that if article 18 was to be retained, then there were still many points of disagreement to be resolved. If, on the other hand, the issues covered in article 18 were to be left to the Hague Conference, then any work which that body undertook on the question of conflict of laws would be of more general applicability than was necessary for the Commission's purposes. For those two reasons, he supported the proposal of the representative of France that a group of experts should resolve the question of article 18; representatives of the Hague Conference should be invited to participate in such a group.

37. The CHAIRMAN said that if the French proposal were to be accepted, the Model Law would end after article 17. The Commission would adopt an incomplete Model Law, the question of conflict of laws would be studied by a group of experts, and a provision on the issue might or might not be added to the Model Law at a later date.

38. Instead, he suggested that the provisions of article 18 shall be incorporated in a footnote to the Model Law. The footnote could specify that as the question of conflict of laws did not directly affect credit transfers, States might wish, but were not obliged, to adopt a rule such as that in article 18. That solution would allow States which felt a need for the provisions of article 18, to adopt the article, however imperfect. At the same time, it would satisfy those that did not wish its provisions to be included in the Model Law, and lastly, it would allow the Commission to continue its work and move on to other issues.

39. Mr. GREGORY (United Kingdom) agreed with the Chairman and with his reasons for not wishing to submit article 18 to a special group. He also agreed with the observer for IMF that the Hague Conference would take a wider view of the rules on conflict of laws than was necessary for the Commission's purpose of resolving disputes in the one very specific area of international credit transfers. Within that limited context, he felt that article 18 was highly effective.

40. He supported the Chairman's suggestion that article 18 should be incorporated in a footnote, for adoption or rejection by individual States as they saw fit.

41. Mr. DASTIS (Spain) also agreed with the Chairman's suggestion, but expressed a preference for an annex over a footnote. A footnote had to be at the foot of something, and there would be nothing in the text to which article 18 as a footnote, could be attached.

42. The CHAIRMAN said that, while he would prefer an annex, he had suggested a footnote for the sake of consistency in the draft Model Law.

43. Mr. SAFARIAN NEMAT-ABAD (Islamic Republic of Iran) suggested that the second sentence of article 18 (1) should be deleted and the first sentence, on which there was consensus, retained. In that way, the draft Model Law would both respect the principle of contractual freedom and contain a provision concerning conflict of laws.

44. The CHAIRMAN pointed out that many delegations were opposed to the deletion of the second sentence of article 18 (1). Moreover, it was not possible to split up a single provision in the manner suggested by the representative of the Islamic Republic of Iran.

45. Mr. GRIFFITH (Observer for Australia) agreed with the representative of Spain.

46. Paragraph (1) should not be split up, since a rule providing for situations in which there was no agreement between the parties was necessary in order to complete the structure of the proposed norm.

47. Mr. FUJISHITA (Japan) supported the idea of a footnote. The footnote should, however, state that the Commission had failed to achieve a consensus on the text of article 18 and that its application was optional.

48. The CHAIRMAN said that he had suggested a footnote precisely because it was desirable to avoid any reference in the Model Law to a lack of consensus.

49. Mr. BURMAN (United States of America) said that, while he had no objection to the use of a footnote, there was indeed consensus on the first sentence of article 18 (1). The two sentences of article 18 (1) dealt with different questions which might usefully have been separated in the Commission's discussions. The first sentence related to the choice of law and not to conflict of laws; it should be appended to article 3, concerning variation by agreement, while the provision of the second sentence might be included in a footnote to either article 1 or article 3.

50. He was not in favour of an annex, because it would create doubt in the minds of users concerning the relative importance of the provisions contained in the annex and in the footnotes respectively.

51. The CHAIRMAN urged members not to be sidetracked into a discussion of whether or not to retain the first sentence of article 18 (1), on which, moreover, the Commission had not reached a consensus. He hoped that the representative of Spain would not insist on the use of an annex.

52. Mr. ALVAREZ (Uruguay) supported the arguments of the representative of Spain in favour of an annex, which would also give more prominence to the provision it contained.

53. The CHAIRMAN said the fact that article 18 was unattached to any other provision in the draft Model Law was a minor detail. The Drafting Group would have enough resourcefulness to place the footnote at a logical point in the text.

54. Mr. RENGER (Germany) said that he would support either solution. He agreed with the representative of Japan that the footnote should include a statement that explained why the provision had been placed in a footnote.

55. The CHAIRMAN said that the footnote should contain a statement along the following lines: "The Commission felt that the provision on conflict of laws was directly related to the question of credit transfers. Countries may, however, decide whether they wish to accept the provisions of this article."

56. Mr. DASTIS (Spain) said that he would support the use of a footnote to article 1, as suggested by the representative of the United States.

57. The CHAIRMAN said he took it that the Commission wished to accept his suggestion for a footnote.

58. It was so decided.

59. Mr. BHALA (United States of America) said that the purpose of paragraph (2) was to serve as an exception to paragraph (1) in the case of interloper fraud, for example, where the sender sent a payment order in the name of an innocent customer. His delegation was opposed to paragraph (2) because it offered no guidance on the applicable law in cases of interloper fraud in which the actual and purported senders came under different jurisdictions. In contrast, paragraph (1) provided clear guidance, and the predictability which it offered would be lessened if paragraph (2) were retained.

60. The CHAIRMAN pointed out that the objective of article 18 (2) was limited to article 4 (1) and did not extend to article 4 in its entirety. Article 4 provided for situations in which a payment order was either authenticated or authorized. Where the payment order was authenticated according to the procedures provided in paragraph (2) of article 4, the same conflict-of-laws rule would apply as in the draft Model Law as a whole. Paragraph (1) referred to an exceptional situation in which there was authorization but not authentication. In such a case, the law of the State of the receiving bank would apply.

61. Mr. DE BOER (Observer for the Netherlands) observed that it might be possible for a country to accept only the conflict-of-laws rule and not the remainder of the Model Law.

62. Mr. HERRMANN (Secretary of the Commission) said that the provision on conflict of laws was important even if a country did not accept the Model Law. It should therefore be considered separately from the remainder of the text. Article 18 (1) sought to determine the domain of the applicable law, while article 18 (2) envisaged an exception. The issue which was the subject of the exception must be described, and not for the purposes of article 4 (1). In fact, one solution might be to delete the words "for the purposes of article 4 (1)" from paragraph (2) of article 18.

63. Mr. CHATURVEDI (India) said that paragraph (2) was related to paragraph (1) and should therefore be either deleted or similarly placed in a footnote.

64. The CHAIRMAN said that his suggestion was for the entire article to be placed in a footnote.

65. Mr. FUJISHITA (Japan) said that paragraph (2) should be retained as a footnote since it would be useful to provide conflict-of-laws rules for questions of agency.

66. Mr. GREGORY (United Kingdom), supported by Ms. KOSKELO (Observer for Finland), said that he shared the opinion of the Secretary of the Commission that the words "for the purposes of article 4 (1)" should be deleted from paragraph (2).

67. The CHAIRMAN said he took it that the Commission wished to delete those words and adopt article 18 (2), as amended.

68. It was so decided.

The meeting rose at 1 p.m.